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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

UNITED STATES, APPELLANT,
v.
THE UNITED ENGINEERING & CONTRACTING CO. } No. 381.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellee entered into a contract with the United States on the 15th day of September, 1900 (dates are important in this case), to construct "within seven calendar months from the date of this contract," a pumping plant for Dry Dock No. 3 at the United States navy yard in the city of New York, in accordance with plans and specifications attached to and forming a part of said contract.

The United States reserved the right to make such changes in the contract, plan, or specifications as the Chief of the Bureau of Yards and Docks might think advisable. (Par. 17, R., p. 13.) Soon after appellee had assembled its men and materials, and begun

work on the construction of the pumping plant originally provided for, the Chief of the Bureau of Yards and Docks decided to change the location of the pumping pit and to increase the size and capacity of the entire plant so as to make it a pumping plant for both Dry Docks Nos. 2 and 3 at said navy yard. (Finding III, R., p. 35.)

A supplemental agreement to carry into effect these changes was entered into on the 21st day of January, 1901, wherein it was agreed, among other things, that the time for completion should be extended six calendar months, or until October 15, 1901. (Par. 8, R., p. 26.)

The work was not completed by this date, nor for a long time thereafter. February 16 and March 7, 1903, two supplemental agreements were entered into, one providing for the construction of three hatches in the roof of the pump well and the other for certain changes in the pump-well floor. (Exhibits B and C, R., pp. 27 and 29.) In neither of these supplemental agreements was there any reference whatever to an extension of time, for the obvious reason that a year and four months had already elapsed since the time "fixed" in the agreement for the completion of the work.

Appellee proceeded with the work of constructing the pumping plant in accordance with the provisions of said four agreements—876, 876–A, 876–B, and 876–C—and finally tendered the same "for tests" about April 21, 1904. Tests were made of the different parts of the plant and incidental repairs and

changes made, and the plant was finally accepted April 5, 1905. (Findings VII–IX, R., pp. 36–38.)

The court finds that—

> During the period from May 1, 1903, to about April 21, 1904, the work was delayed by the claimant's subcontractors in not getting the pump castings in place, for which the Government was in no way responsible (p. 10).

It then proceeds to find that the Government had delayed the contractor "up to" May 1, 1903, or in other words, that the delays up to that time were not chargeable to the contractor, and that subsequent to said date up to April 21, 1904, the Government was responsible for some delays which occurred. Summing it all up, the court finds as an ultimate fact that—

> Notwithstanding the delays of the Government, the claimant with reasonable diligence could have completed the plant for tests during said period by about September 21, 1903. The time consumed by the claimant, from that time to April 21, 1904, a period of 210 days, or seven calendar months, was unreasonable. * * *

Acting under authority of paragraph 12 of the specifications attached to and forming a part of the original agreement, the Chief of the Bureau of Yards and Docks held that appellee was responsible for eight months, or 240 days, of delay in completing the work and thereupon deducted from the balance due under the contract $25 per day, or $6,000, as liquidated damages.

The court found that if the damages to the Government on account of the unreasonable delay were "measured by the liquidated-damage clause of paragraph 12 of the specifications," the sum which should have been deducted was $5,250. It further found that there was no evidence as to what the actual damage sustained by the Government was, and that if the Government was entitled to recover only actual damages "then the claimant is entitled to recover the whole amount of $6,000 so deducted; otherwise the difference between the amount so deducted and the amount found by the court, $750, * * *." (Finding VIII, p. 37.)

During the progress of the work the contractor was required to inclose the gearing of a certain valve in a casing. It was claimed that this was not required by the contract and the court so decides. (Item 4, Finding X, p. 38.)

The contract required that an auxiliary pump should be installed in the pump well for the purpose of priming the centrifugal pumps—that is the main pumps provided for by paragraph 58 of the specifications—with either fresh or salt water. (Paragraph 62, p. 21.) There was in the yard at this time a salt-water system of piping provided for fire protection for the navy-yard reservation, exclusively. There was also a fresh-water system of piping which was connected with and a part of the Brooklyn city fresh-water system.

The pressure in the salt-water system was subject to a sudden increase in pressure, due to the use of the

same in case of fires. The fresh-water system was subject to increase of pressure, more or less sudden, on account of the cessation of use of fresh water in the manufacturing plants and other industrial institutions located in the vicinity of the navy yard in the city of Brooklyn.

Some time in the autumn of 1904 one of the volutes of one of the pumps burst as the result of sudden pressure, which it is said in the finding, was "caused by the Government in one or the other of said water systems without notice to the claimant and without its fault." The contractor immediately repaired the break and took some precautionary measures against its occurring again, but notwithstanding this precaution, another drainage pipe was subsequently broken "by pressure in one or the other of said systems." This break was also repaired. The cost of repairing both breaks, it is found, was $699.97. (Finding XI, p. 40.)

The court rendered judgment in favor of the appellee on each of the above-mentioned items, aggregating $7,179.02. The Government contends that in this the court was in error for reasons which will more fully appear in the argument. Judgment should not have been rendered on these items for more than $750.

ASSIGNMENTS OF ERROR.

The court below erred:

(1) In holding that by preventing the completion of the work within the contract time the Government thereby waived the time limit so as to disable

itself from thereafter claiming the benefit of the liquidated damage clause of the contract and from deducting from the contract price liquidated damages for the period of unreasonable delay.

(2) In rendering judgment in favor of the appellee for more than $750 on the facts stated in Finding VIII.

(3) In rendering judgment in favor of the appellee on the facts stated under item 4 of Finding X.

(4) In rendering judgment in favor of the appellee on the facts stated in Finding XI.

ARGUMENT.

I.

FIRST ASSIGNMENT OF ERROR.

The Court of Claims was in error in holding that the rights of the Government under the liquidated clause of the contract were waived by the Government preventing the completion of the work within the contract time.

The court finds that the Government, by making changes and alterations in the work and in the use of the docks for docking vessels while the work was going forward, prevented the completion of the same within the time fixed in the contract for completion and so interfered with and delayed the contractor in these respects that May 1, 1903, said contractor was "up to time" on its contracts, but that subsequent to that time and up to April 21, 1904, when the plant was tendered for tests, the contractor consumed "seven calendar months more time than was necessary to

perform the work." (Findings VII and VIII, pp. 36, 37.)

The court holds, as we understand the opinion, that notwithstanding the fact that appellee did not complete the work within a reasonable time by 7 months, or 210 days, the Government is not entitled to have its damages measured by the liquidated damage clause of the contract (par. 12, p. 11) because it prevented the completion of the work within the contract time, thereby waiving the time limit so as to disable itself from "thereafter claiming the benefit of the liquidated damage clause of the contract for failure to perform within a reasonable time" (p. 44).

There is no question but that the contract in this case provides for liquidated damages and not penalties. That was virtually conceded by the counsel for appellee in the argument of the case below, and the court, in its opinion, has proceded on the assumption that that question is settled (pp. 43, 44).

The proposition advanced by the court that where a contractor is prevented by the building owner from completing the work within the contract time, but completes it within a reasonable time thereafter, the building owner is not entitled to enforce either a liquidated damage or a penalty clause for the contract is sound and well supported by authority. By the same token it may be said that a building owner is not entitled under such circumstances to recover any damages whatever. The cases of *Ittner* v. *United States* (43 C. Cls., 336) and *Moore, Re-*

ceiver, v. *United States* (46 C. Cls., 139), referred to in the opinion, are to this effect. Many other cases along the same line might be cited.

It is our contention that the weight of authority and the logic of the decisions are against the proposition advanced by the court below, that the building owner by preventing the contractor from completing within the time fixed notwithstanding the fact that he does not complete within a reasonable time thereafter abrogates a *liquidated damage* clause in the contract, whatever may be said of a *penalty* clause. The case of *The District of Columbia* v. *Camden Iron Works* (181 U. S., 453) goes no further than to construe the contract there as providing for fines or penalties and to hold that strict performance having been prevented by the District of Columbia it thereby disabled itself from claiming "fines and penalties for delay or failure to complete."

In the cases of *The Jefferson Hotel Co.* v. *Brumbaugh et al.* (168 Fed. Rep., 867) and *Velter Mfg. Co.* v. *Tygarts Valley Brewing Co.* (id., 1002), cited in the opinion (pp. 47, 48), the court seems to have construed the contract as providing for a *penalty* in case the contractor should fail to complete the work within a stipulated time. It was found in the first of these cases that the building owner was chargeable with the delay which prevented the contractor from completing within the contract time, and the court held that under these circumstances the contractor "would be relieved from liability for a contract penalty for delay." In the second case

it was found that the delay which prevented the completion of the work within the contract time was caused by the mutual default of the parties, and that therefore the "contract penalties will be regarded as waived and the court will not attempt to apportion the delays between the owner and the contractor." Neither of these cases, it seems to us, goes so far as to hold that a clear provision for liquidated damages would be waived by the building owner under the same circumstances. In any event these cases were virtually overruled by *Schmulbach* v. *Caldwell et al.* (196 Fed., 16, 24 *infra*).

The English and New York cases referred to in the opinion are the only ones which seem to support the proposition advanced by the court below. In the New York cases it will be noted that the courts state as a ground for the decisions that a contractor is entitled to know precisely when he is laboring under the burden of a liability for liquidated damages and that he can not know this if he is prevented by the building owner from completing the work within the contract time; that it ought not to be left to future settlement or the arbitrament of a judicial tribunal to say when a liquidated damage provision in the contract should be applied. The same can be said of the liability for actual damages. Once it has been decided that the contract provides for liquidated damages and not a mere penalty it must be assumed that the damages thus agreed upon are reasonable and fairly equivalent to the actual damages likely to result.

Upon what principle of law can it be said that a building owner waives his right to "liquidated" damages by preventing the contractor from completing within the specified time, any more than he thereby waives his right to actual damages? And yet the courts of this country, which have followed the decision in *Holme* v. *Guppy* or *Dodd* v. *Churton*, and which seem to support the doctrine laid down by the court below, uniformly concede that under such circumstances the building owner is entitled to recover *actual* damages if the contractor does *not* complete within a reasonable time. (See *Mosler Safe Co.* v. *Maiden Lane S. D. Co.*, 199 N. Y., 479, and *Hamilton* v. *Moore*, 36 Upp. Can., Q. B., 520.) This simply means that, so far as the recovery of "actual" damages is concerned, the prevention of completion within the contract time by the building owner merely postpones the date originally agreed upon and fixes a new date by implication, and that the remaining terms of the contract are not affected by such prevention or waiver. We submit that the same rule and reason apply where the damages are actually liquidated.

The cases which seem to us to uphold the Government's contention here are:

Wallis v. *Wenham* (204 Mass., 83).
Wilkins v. *Wilkerson* (Tex.) (41 S. W., 178).
Mason v. *Rempe* (Tex.) (41 S. W., 694).
Niblett v. *McGraw et al.* (41 Tex. Civ. App., 239–244).
Herbert v. *Weil* (115 La., 425).

Vanderhoff v. *Schell* (42 Oreg., 578–591).

Reichenbach v. *Sage* (13 Wash., 364).

Wiley v. *Hart* (Wash.) (132 Pac., 1015, 1019). (The promisee in this case was denied the right to liquidated damages, on the ground, however, that it was not practical to apportion the delay.)

Engineering Co. v. *National Tube Co.* (184 Pa. State, 251–261). (In this case performance was prevented by the promisee. The contractor did not complete within a reasonable time. It was held that the promisee was entitled to liquidated damages for delay following the lapse of a reasonable time.)

Coal & Iron Co. v. *Rehrd* (204 Fed. Rep., 859, 879).

Morse Dry Dock & Repair Co. v. *Sea Board Transportation Co.* (161 Fed. Rep., 99).

Schmulbach v. *Caldwell* (196 Fed. Rep., 16, 24).

McGowan v. *Amer. Tan Bark Co.* (121 U. S., 575).

United States v. *Bethlehem Steel Co.* (205 U. S., 105).

In *Wallis* v. *Wenham* (*supra*) the opinion discusses the cases of *Dodd* v. *Churton*, *Holme* v. *Guppy*, *Willis* v. *Webster*, and some other cases referred to and apparently relied upon by the court below in the case at bar, and reaches what we believe to be a sound and impregnable conclusion, to wit, *that the only effect of delay or interference on the part of the building owner is to extend the contractor's time limit by the amount of such delays.*

the work by changes in the plans of construction, just as in the case at bar it found that the Government delayed the contractor by making changes and alterations in the work and in the use of the docks for docking vessels to such an extent that the contractor was not in default until May 1, 1903, which was a year and seven months after the time fixed for completion. In the Bethlehem case the court found that both parties contributed to the delay in the completion of the work and apportioned the same. In the case at bar the court has apportioned the delay and found that the appellee is chargeable with having unreasonably delayed the work of completion 210 days.

The Court of Claims rendered judgment in favor of the Bethlehem Steel Co. on the ground that the contract provided a penalty rather than liquidated damages. This court reversed the judgment holding that the clause of the contract in question provided for liquidated damages and further holding in effect that the Government was entitled to recoup itself by deducting the sums for such portion of the entire delay as the contractor was chargeable with. It is submitted that the decision of the court below in the case at bar flies square in the face of the decision of this honorable court in the Bethlehem Steel Co. case.

In the very nature of things it would have been impracticable, if not impossible, for the United States to have proven actual damages resulting from the

failure to have the use of this pumping plant before or at a certain specified date, just as it would have been practically impossible for it to have proved its actual damages for the nondelivery of the gun carriages involved in the Bethlehem Steel Co. case. It was because of this fact that the parties here agreed to a measure of damages. That measure, by the terms of the contract, was to be applied for every day's delay beyond the time fixed for completion "or the time allowed by the Chief of the Bureau of Yards and Docks under paragraph 11 of this specification * * *." Paragraph 11 of the specifications merely provided that extensions of time could only be allowed and made "in writing" by the chief of the bureau, etc. It does not provide when that extension shall be made.

The Chief of the Bureau of Yards and Docks investigated and weighed all the facts and circumstances in connection with the time consumed in completing this work after it had been completed, when by taking a retrospective view he could determine with reasonable accuracy the actual amount of time necessarily consumed in view of the changes made and difficulties with which the contractor came in contact and for which he was not responsible. It was much better to proceed in this manner than to undertake by a prospective view to extend the time for completion. The chief of the bureau arrived at the conclusion that taking the whole period of work from the time specified for com-

pletion up to the time of actual completion the contractor was responsible for 8 months, or 240 days, of delay. The Court of Claims has reviewed that action on his part and revised it to the extent of finding that the period of unreasonable delay was only 7 months, or 210 days. Whether or not it was competent for the court to revise the finding of the chief of the bureau on grounds other than those of bad faith or its equivalent, we will not stop to discuss here or seek to have the court determine. Nevertheless, it may not be inappropriate to call attention to the fact that the action of the chief of the bureau in this respect so closely coincides with the view of the Court of Claims as to justify us in making the statement that appellee was treated with the utmost fairness and leniency in assessing the damages in this case; that there was absolutely nothing about the transaction savoring of the infliction of a penalty.

It is suggested by the court that it would have been competent for the parties here to have agreed that in case of the waiver of the stipulation as to the time the "liquidated damage clause might be continued and made applicable to an unreasonable time" (p. 51). We submit that it was made applicable to an unreasonable time by the following contract provisions:

> In case the work is not completed within the time specified in the contract *or the time allowed by the Chief of the Bureau of Yards and Docks*, * * * deductions at the rate

> of $25 per day shall be made from the contract price for each and every calendar day to and exclusive of the date within which completion was required, etc.

In supplemental agreement 876–A it was provided:

> That this agreement shall be held and regarded as, and be supplemental to, the aforesaid contract dated September 15, 1900, and shall be subject to all the requirements and conditions thereof * * * and shall in no manner affect the validity and effect or action thereof, or of the bond attached thereto.

In supplemental agreements 876–B and 876–C it was provided in substance that nothing therein should be held to in any manner or degree "affect, modify, alter, omit, or vitiate" any provision or requirement of the original contract, plans, or specifications, except as specifically provided.

II.

SECOND ASSIGNMENT OF ERROR.

Judgment should not have been rendered in favor of the appellee for more than $750 on the facts stated in Finding VIII.

It is unnecessary to enter into a discussion of this assignment of error *in extenso*. The Chief of the Bureau of Yards and Docks acting under authority of the contract (pars. 11 and 12, specifications, p. 11) extended the time for completion of the work to cover the entire period actually consumed, less 240 days; at least that was the effect of his action in

directing that there should be deducted from the balance due the contractor the sum of $6,000 "as liquidated damages." Assuming that it was competent for the court to review and revise that action, it follows that if the Government's contention as to the first assignment of error is sustained, the judgment should not have been for more than $750.

III.

THIRD ASSIGNMENT OF ERROR.

The court erred in rendering judgment against the United States on the facts stated under item 4 of Finding X.

It is not specifically provided in the plans and specifications that gear casing for the valves should be furnished, but it is provided that:

> Any details omitted from either plans or specifications, or from both, the performance of which is necessary to the construction, of which the civil engineer in charge shall be the judge, shall be supplied by the contractor as though fully described and shown and without additional expense to the Government. (Par. 1 of the specifications, p. 10.)

It is also provided, in substance, that any omission from the plans or specifications of any detail of work necessary to secure a complete and substantial pumping plant shall be supplied by the contractor "as though fully and correctly shown, described, and required in and by the contract." (Specifications, par. 3, p. 10.)

Under the provisions of the contract referred to we insist the appellee was obliged to surround the gearing of the valve in question with casing, that being the most economical and modern device in use for such purpose.

The fact that the contractor had purchased the valve without the casing and that it was not the custom of the trade for manufacturers of valves to furnish casing unless specially requested (Finding X, p. 38) is totally irrelevant. The only question is, Was the valve, in the situation in which it was necessarily placed, without casing or protection of some kind, a menace or danger to persons having business in the pump well? The court finds that it was planned and intended by the contractor to open and close the valve in question by motors "operated from a switchboard so arranged that workmen need not be in close proximity thereto. *This method was abandoned.*" Of course it follows that when this method was abandoned workmen had to be in close proximity to the valve while opening and closing the same. From this fact it is fairly to be inferred that there would be danger of the clothing of the workmen being caught in the rapidly-moving gearing.

The court further finds that the Government for its own use built a plank walk across the top of the pipes passing near this same valve, and that this gave rise to the necessity for inclosing it with a casing. It is perfectly evident, however, that the men who were stationed at the valve during the period of opening or closing the same while the gear-

ing was moving at a high speed would be in danger, as well as the man who was casually passing along the walk. There is no denying that part of the danger which suggested the advisability of encasing the gearing was the presence of the plank walk, but, as just suggested, it is equally clear that it was not the *sole* cause. But even if it were, it would not change the fact that the casing was necessary for the safety of persons employed in operating the pumping plant.

In conclusion, we think it is clear that the encasing of the valve in question was a proper precaution to take for the safety of the employees engaged in operating the pumping plant, and that it was necessary so to do in order to make the plant "complete" and "substantial" within the meaning of the first paragraph of the specifications attached to the original contract (p. 10), from which it follows that the judgment in favor of the appellee on this item should be dismissed.

IV.

FOURTH ASSIGNMENT OF ERROR.

The court erred in rendering judgment against the United States on the facts stated in the eleventh finding of fact.

It was provided in the contract that the system for priming the pumps in the pump well should be connected with the yard system of fresh-water supply, which consisted of the Brooklyn fresh-water system and the navy-yard salt-water system provided for fire protection. It also provided (par. 20, p. 13) that the

contractor should be responsible for the safety of the entire work during the whole period of construction.

The facts found show that the fresh-water system was liable to sudden increase of pressure on account of the closing down of factories located in the vicinity of the navy yard in the city of Brooklyn, which would, of course, occur at the closing hours of work on each day. It is also shown that on the occasion of a fire in the navy-yard reservation when the salt-water system was called into requisition the Government would increase the pressure in that system. The findings show that the drainage pipes or volutes were broken from "excessive" pressure, but they do not show from which of the two causes the "excessive" pressure arose. The court finds that in whichever system it was the sudden pressure was "caused by the Government * * * without notice to the claimant and without its fault." So far as relates to the fresh-water system this finding of fact is palpably wrong. If the sudden pressure was due to cessation of the use of fresh water in the Brooklyn city system, how would it be possible for the Government of the United States to be responsible for that or to "cause" this sudden pressure? It could not give notice of it to the appellee for the perfectly obvious reason that it could not know any better, at least than the appellee's officers knew, that the pressure was liable to be increased suddenly from this cause. If the sudden increase was due to the use of the salt-water system it could hardly be expected that the Gov ment

should allow the buildings or whatever structure might be on fire to continue to burn while an agent was sent to notify the appellee that they were about to increase the pressure in the salt-water system.

The appellee was as well aware of the facts with reference to the possible sudden increase of pressure in these water systems as the Government agents, and it should have provided against it in the first instance. For the reasons stated the judgment of the court on this item should be dismissed.

CONCLUSION.

In conclusion we respectfully submit that the judgment of the Court of Claims should be reversed and the case remanded with instructions to enter judgment in favor of the appellee on the facts stated in the eighth finding of fact for $750 only, and to dismiss the petition as to item 4 of Finding X and Finding XI.

HUSTON THOMPSON,
Assistant Attorney General.

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APPELLEE'S

BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 381.

UNITED STATES, APPELLANT,

vs.

THE UNITED ENGINEERING AND CONTRACTING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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OCTOBER TERM, 1913.

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UNITED STATES, APPELLANT,

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THE UNITED ENGINEERING AND CONTRACTING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

Preliminary Statement.

This is an appeal by the United States from a judgment of the Court of Claims in an action growing out of a contract made September 15, 1900, with the appellee, for the construction of an electrical pumping plant for Dry Dock No. 3 at the New York Navy Yard. The appellee sued for $32,960.16 (R., p. 6); and after abandoning certain items of its original claim was awarded $18,815.77 (R., p. 41).

The appeal of the Government embraces only three items of the judgment, aggregating $7,179.02 (Appellant's Brief, pp. 5, 6), of which $750 is conceded, leaving the amount involved in the assignments of error $6,429.02, to wit:

Refusal to deduct "liquidated damages" for 210 days' delay (Finding VIII, p. 37)	$5,250.00
Allowance for gear casing (Finding X, item 4, p. 38)	479.05
Allowance for pump breakage (Finding XI, p. 40)	699.97
Total	$6,429.02

The first of these items constitutes the principal error complained of (Assignments I and II, Appellant's Brief, pp. 5, 6).

The court below held that the contract date of completion had been abandoned and the time limit waived by the United States; that the damage clause of the contract (R., pp. 11, 12) expressly applied to a fixed date of completion and specifically required any extension thereof to be made in writing before the appointed date expired; that such clause could not be enforced by a retrospective attempt to fix a date of completion years after the original time had expired, and that, although there was a period of delay (210 days) beyond a reasonable time of completion during which the United States would have been entitled to recover any actual damages it had sustained, as there was no proof of any such actual damages, the officers of the United States were not justified in arbitrarily deducting $6,000 for "liquidated damages" for this period, at the rate of $25 per day, under a dead provision of the contract which they had made no effort to keep alive.

ARGUMENT AND AUTHORITIES.

First and Second Assignments of Error.

Refusal of Court Below to Deduct Liquidated Damages.

The court below did not, as counsel for the appellant states (Brief, p. 7), deny the Government's claim "to have its damages measured by the liquidated damage clause of the contract, because it prevented the completion of the work within the contract time, thereby waiving the time limit so as to disable itself from thereafter claiming the benefit of the liquidated damage clause of the contract for failure to perform within a reasonable time." Counsel has imperfectly and inaccurately stated but one of the many arguments advanced by the court below in support of its conclusions in the course of an able and exhaustive opinion (R., p. 51; see also R., pp. 42, 43, 44, and especially pp. 46, 47, 50, and 52).

The judgment of the court, which is what this court is called upon to review, was predicated upon the following facts:

The court found that the date of completion specified in the original contract 876 of September 15, 1900, was extended by supplemental agreement 876A, dated July 21, 1901, to October 15, 1901 (Finding III); that thereafter a controversy having arisen between the Government and the contractor regarding the work, on January 13, 1903 (*fifteen months after this date had expired*), the chief of the Bureau of Yards and Docks appointed a board to consider changes in the bottom of the pump well and the compensation to be paid therefor. The contractor was advised by letter of these changes and was therein informed "that it would be expected to immediately resume work under its contract, and *push the same to completion with the utmost dispatch*, otherwise the bureau would annul the contract and

take over the entire work thereunder;" that "the claimant thereupon promised to push the work to completion *as rapidly as possible*, and with this promise the bureau appears to have been satisfied" (Finding IV); that after the date fixed for the completion of the work under these original and supplemental contracts, the claimant, on February 16, 1903, and March 7, 1903, entered into two additional supplemental contracts, 876B and 876C, increasing the quantity of the work and the price thereof, but *neither of these contracts made any mention whatsoever of the date of completion of either the original or additional work nor concerning the subject of delays prior thereto* (Findings V and VI); that the claimant proceeded under these various contracts with reasonable dispatch and without delay on its part until May 1, 1903 (Finding VII).

The contract contained the following specific provisions regarding extensions of time and damages for delay:

> "11. Extension of time.—Extensions of time for the completion of the work can only be allowed and made, in writing, by the chief of the Bureau of Yards and Docks, and every extension of time must be specifically made and shall not be implied from any cause under any circumstances.
>
> "12. Damages for delay.—In case the work is not completed within the time specified in the contract, or the time allowed by the chief of the Bureau of Yards and Docks under paragraph 11 of this specification, it is distinctly understood and agreed that deductions at the rate of $25 per day shall be made from the contract price for each and every calendar day after and exclusive of the date within which completion was required up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon as the measure of damage to the United States by reason of delay in the completion of the work, and the contractor shall agree and consent that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract" (R., pp. 11, 12).

The court found that "no forfeitures or delays were charged to the claimant to October 15, 1901, *the time fixed for the completion of the work*, nor thereafter to May 1, 1903" (Finding VII). In February, 1905, the Bureau of Yards and Docks designated a civil engineer to make a review of the matter of delays, and he reported that notwithstanding the increased work required by the supplemental agreements and the restrictions placed upon the work "the claimant was 'up to time' on its contract to May 1, 1903, but that subsequent to that date and up to April 21, 1904, the claimant had taken seven calendar months' more time than was necessary to perform the work." Subsequently, on March 24, 1905, another supplemental agreement (876D) covering certain deductions from the contract price and containing the reservation "that nothing herein contained and no action taken hereunder shall in any manner or degree affect the rights of either party hereto in the matter of delay and the completion of the work or otherwise except as specifically stated" was tendered to the claimant for signature and it refused to execute it. And, "thereafter *in February, 1906, long after the plant had been accepted*, the bureau held the claimant responsible for 240 days' delay, at the rate of $25 per day, or $6,000, as liquidated damages and deducted the same from the balance due under the contract, which balance the claimant accepted under protest," etc. (Finding VIII).

It will be perceived from the foregoing recital of facts, as the court below found, that the appellant not only ignored the finding of its own civil engineer regarding the time of delay, but, in attempting, by a retrospective review made many years after the original date of completion had been ignored and waived, to fix a new and definite date of completion, the appellant clearly violated the letter of the contract, which empowered it to extend in advance the *date of completion* in the manner prescribed in paragraph 11, *supra*, and gave no authority for making an extension or fixing a

new date of completion long after the contract date had expired. Furthermore, this action violated the Government's understanding with the contractor that no positive date of completion would be named, but that the contractor should "push the work to completion as rapidly as possible" (Finding IV, *supra*).

After naming a date of completion in the original contract, extending it in the first supplemental contract, and not mentioning it in any of the other supplemental contracts, and after permitting the contractor to go on and complete several years after said extended date of completion had expired without making any further formal extension of time or finding the contractor in default for delay, and after clearly indicating that no definite time of completion longer existed by asking the contractor to push the work to completion "with the utmost dispatch," we submit that this clause of the contract relating to the time of completion upon which the right to assess damages is predicated, as this court said in *Cramp & Son vs. United States* (216 U. S., 494, 503), *"was plainly treated by both parties as impracticable and therefore waived."*

Forfeitures or penalties for delay or failure to deliver articles under a contract cannot be recovered if strict performance by the plaintiff has been prevented or waived by the defendant.

District of Columbia *vs.* Camden Iron Works, 181 U. S., 453.

King *vs.* U. S., 37 Ct. Cl., 428.

In an action to recover on a contract by which plaintiff was to install an extensive heating and ventilating plant in defendant's manufacturing buildings, where the work was delayed through the acts and omissions of both parties, but was continued without objection beyond the time fixed by the contract and until nearly completed, the jury were justified in finding that defendant had waived such time limit.

N. P. Pratt Laboratory *vs.* Buffalo Forge Co., 184 Fed., 287.

See also many other authorities cited in the opinion of the court below.

The following remarks of this court in United States *vs.* Gleason (175 U. S., 588, 609), are particularly applicable to this case:

> "As no *actual damage* or loss was definitely shown to have been suffered by the Government by reason of the non-completion of the work, and as no forfeitures were declared at the time of the several extensions and *may therefore be deemed to have been waived,* we affirm that portion of the judgment of the court below allowing a recovery for the retained percentages of the compensation for work actually done and accepted."

The appellant showed that it realized that the time limit had been waived and its right to claim delays abandoned by attempting to revive it. When the work was done and the plant practically accepted, the defendant prepared and tendered to the claimant, and the claimant refused to execute, supplemental contract 876D on March 24, 1905, in which for the first time in years the Government attempted to reserve its "rights" in the matter of delay.

The abandonment of rights under a contract by executing a later substituted contract for the same work is not prevented by protesting that the rights still exist under the former.

> United States *ex rel.* International Construction Company *vs.* Lamont, 155 U. S., 303.

> "When the stipulation as to the time has been waived, it is eliminated from the contract and therefore relieves the contractor from stipulated liquidated damages for non-completion within the time specified. The waiver established, the contractor may then have an action for the contract price, including the percentage retained as liquidated damages for non-performance within the stated time, and the owner must show any injury he has suffered if he

will retain damages out of what is due the contractor or recoup them from what he has paid."

Wait's Engineering and Architectural Jurisprudence, sec. 726, pages 667, 668.
Flynn *vs.* Des Moines R. R. Co., 63 Iowa, 491.
Phillips *vs.* Seymour, 91 U. S., 646.

"A undertook certain building operations for X, which were to be completed by a certain date, or a sum to be paid as compensation for delay. While the building was in progress an agreement was made between the parties for additional work by which it became impossible that the whole of the operations should be concluded within the stipulated time. It was held that the subsequent agreement was so far inconsistent with the first, as to amount to a waiver of the sum stipulated to be paid for delay."

Anson on Contracts, page 337.

"Where a fixed time has ceased to be an element in the contract neither party can put the other in default without some notice or demand of performance."

Lawson *vs.* Hogan, 93 N. Y., 39, 44.

"When work is not going to be completed by the time required by the contract the failure of the contractor should not be allowed to pass unnoticed, and the contractor permitted to continue his work as if nothing had happened. If the right reserved to the company to declare the contract at an end is not to be exercised, a new time limit should be agreed upon and indorsed upon the contract, with any other conditions agreed upon, including an express agreement that each and every other condition and stipulation of the original contract shall remain in force; then and only then does the owner reserve to himself the rights and protection which the original contract afforded him."

Wait, *supra*, sec. 727, page 669.

"Care must be taken when there has been default or delay on the part of the contractor not to waive

the stipulation for liquidated damages, as in so many other cases cited a failure to notice the default, or a continuance of the work and payments as if nothing had happened, may constitute a waiver of the right to exercise the power bestowed by the stipulation. Thus it has been held that allowing the contractor to continue the work as if under the contract, after the time limit had expired and without claiming the forfeiture which might have been exacted, was a waiver of the right to such forfeiture."

Wait, *supra*, sec. 325, pp. 269, 270, citing
Sinclair *vs.* Tallmadge, 35 Barb., 602.
Dunn *vs.* Steubing, 120 N. Y., 232.
Foster *vs.* Worthington, 58 Vt., 65.

The power to establish a forfeiture must be exercised within the time mentioned in the contract and before the time for the completion of the work has expired.

Wait, *supra*, secs. 723, 724, p. 664, citing
Walker *vs.* London & North Western R. Co., L. R., 1 C. P. D., 518.
Henderson Bridge Co. *vs.* O'Connor, 11 S. W. R., 18, and many other cases.

"The courts hold that the object of this stipulation is merely to secure a better guaranty of a seasonable performance within the time fixed, and that time having passed it is no longer in force."

Wait, *supra*, sec. 724.
Henderson Bridge Co. *vs.* O'Connor, *supra*.

To sustain the assessment of $25 a day as "liquidated damages" the appellant was bound to show strict compliance with the letter of the contract and establish a fixed date of completion, which was not abandoned and a delay which was not waived but declared to be a default, as the contract expressly provided. Failing to do this the appellant could only justify the assessment of this large penalty as *unliquidated damages* by proving that the contractor was

bound to complete within a reasonable time; that it failed to do so and that by reason of such failure the appellant sustained a pecuniary loss equivalent to the amount deducted (*The Conqueror*, 166 U. S., 110, 125). As the court below found, the appellant failed to maintain either position.

The action of the appellant was not predicated upon the terms of the contract, with which it was bound to comply before it could assess this penalty of $6,000 as liquidated damages, but was based upon the theory that it could substitute for a fixed date of completion what it deemed to be a reasonable time for such completion and assess damages at the contract rate for failure to complete within such time—in other words, that it could arbitrarily adjudicate and settle by this deduction the Government's claim against the contractor for unliquidated and unproven damages growing out of the delay which it found to exist—exactly what this court in *Cramp & Sons vs. United States* (216 U. S., 494, 502) decided the executive officers of the Government had no power to do.

The learned counsel for the appellant endeavors to distinguish many of the cases cited by us and relied upon in the opinion of the court below by asserting that they relate to "penalties" not to "liquidated damages." It will be observed, as Chief Justice Peelle pointed out (R., p. 43), that the contract in this case does not attempt to give these exactions for delay a name, and whether they be characterized as "penalties," "forfeitures," "fines," or "liquidated damages" the effect is the same, namely, to take an agreed portion of the contract price for a contractor's admitted or ascertained delays in completing the work by the required date. The court in construing and interpreting the words in such agreements looks to substance rather than to form, and seeks the intention of the parties instead of wholly relying upon their expressions (*Sun Printing Co. vs. Moore*, 183 U. S., 642).

The right of the United States to assess and deduct $25 a day as damages, under whatever name it may be called,

rests upon the agreement of the parties, and before such a deduction can be made the United States must not only establish the contractor's default, but also show strict compliance on its part with the letter as well as the spirit of the agreement. It has done neither in this case, as the court below found.

The Court of Claims did not decide that the United States could not recover any damages which it may have sustained by the contractor's delay. What it held was that to recover damages the United States must prove them and could not relieve itself of its failure to prove actual damages by relying upon a clause of the contract which it had violated, waived and estopped itself from enforcing (R., pp. 51-52).

The learned counsel for the appellant argues that it would have been impracticable, if not impossible, for the United States to have proven actual damages resulting from its failure to have the use of its pumping plant before or at a certain specified date (Appellant's Brief, pp. 13, 14). There was then all the more necessity for the United States to comply with the terms of the contract in advance, and exercise due care to extend the date of completion and reserve any claim it might have for damages growing out of delays. In a case where the United States is seeking to enforce the full measure of its bond, we submit that the court should not be astute to relieve it from its own negligence or extricate it from difficulties which it might have foreseen and prevented, and take $6,000 of the compensation due the contractor to make good damages where no damages have been shown to exist.

Counsel also argues (Appellant's Brief, p. 14) that it was competent for the chief of the Bureau of Docks and Yards, by a "retrospective view," to have determined a reasonable date of completion from which the damages were to run. No authority will be found in the contract for the assessment of damages by a "retrospective view" or for the substitution of *a reasonable time for completion* for a *fixed date*

of completion, and the wisdom of adhering to the terms of the contract in this regard is made manifest by the fact that the civil engineer designated by the bureau to report upon this question of delays, the chief of the bureau, the court below and the learned counsel for the United States have not been able to agree upon what was a reasonable time for completion.

Review of Appellant's Authorities.

An examination of the authorities cited by the appellant will show that they do not conflict with the conclusions of the court below or with the contentions of the appellee.

In the case of *United States vs. Bethlehem Steel Company* (205 U. S., 105), the dates for completion of the gun carriages were fixed, time was of the essence of the contract, as was shown by a larger price being paid for a shorter time of delivery and a stipulated deduction of an amount per day equivalent to the difference between the short and long time of delivery. There was no evidence in that case, as there is in this, that the Government had abandoned the dates of delivery specified. (See also review of the court below, R., p. 45.)

In the *Ellicott Machine Company* case (43 Court of Claims, 232), the date of completion was definite and fixed and the exact number of days' delay was clearly established, and the contract expressly provided "that time shall be considered as an essential feature of this contract." None of these elements exists in the case at bar.

McGowan vs. American Tan Bark Company (121 U. S., 575) was fully reveiwed by the court below (R., 48). That case did not involve any question of liquidated damages. Only the right to actual damages was there considered, and it was held that the contract time of performance did not begin to run, and no damages could be charged against the plaintiff, until the defendants had the boat ready

for the machinery which the plaintiff had contracted to instal.

In *Morse Dry Dock Company vs. Seaboard Transportation Company* (161 Fed. Rep., 99) the court simply adhered to the rule announced in the McGowan case, *supra*. There were no facts other than the delay of the party claiming damages upon which reliance was placed to establish a waiver of the time limit or damage clause of the contract. No question of liquidated damages was involved. This case was also reviewed at length by the Court of Claims (R., pp. 46, 49, 50).

The case of *Coal & Iron Company vs. Reherd* (204 Fed. Rep., 859) was decided by a divided court. There the date of completion was fixed and an agreed sum as liquidated damages was stipulated to be paid for failure to complete by the appointed date, and the contractor was to receive a definite sum if he completed prior to the date named. There was no question of waiver or abandonment of either the date of completion or of the right to assess damages, the only question in the case being whether a contractor was not entitled to a reasonable extension of time to complete additional work and to relief from damages during such extended time.

Schmulbach vs. Caldwell (196 Fed. Rep., 16, 24) does not, as counsel for the appellant contends, overrule the Jefferson Hotel Company case (168 Fed. Rep., 867), cited by the court below, and upon examination it will be found to support the position of the appellee. The court there held that where there was a fixed date for completion it would not enforce the liquidated-damages clause of a contract because of mutual delays where *"in the absence of evidence of a waiver"* such delays could be apportioned. The court further said:

> "While courts will enforce contracts as made by the parties, they will require that both parties shall live up to them. One may not by a course of con-

duct induce another to act upon the understanding that there is a waiver of strict performance and thereby obtain an advantage or benefit and repudiate liability for fair compensation by invoking the terms of the contract" (Opinion, p. 23).

The State decisions cited by counsel for the appellant on pages 10 and 11 of his brief are all to the effect that *mere delay* upon the part of one seeking to enforce the liquidated-damage clause of a contract does not of itself abrogate such damage clause where there is an absolute and unqualified agreement to perform by a certain day, and that such delay simply results in an equitable extension of the time for completion and relieves the contractor of damages for the period of delay for which he was not responsible. We have never contended that *mere delay* had any other or different effect, nor is there anything in the decision of the court below holding to the contrary. In none of the cases cited by the appellant was it shown that the party claiming the benefit of the liquidated-damage clause had violated or ignored the provisions of his contract relating to the extension of the time of completion, or by subsequent solemnly executed agreement and conduct had indicated that the time limit and damage clause had been abandoned, and that the sole desire was to push the work to completion as rapidly as possible.

Third Assignment of Error.

Gear Casing.

This assignment of error involves Item 4, Finding X (R., p. 38), reading as follows:

> "Gear casing.—The contractor had purchased and installed standard valves which, in accordance with the custom of the trade, were not supplied by the manufacturers with casing or covering. The valves

so installed were intended by the claimant to be opened and closed by motors operated from a switchboard so arranged that workmen need not be in close proximity thereto. This method was abandoned. After the plant was designed and while the work was progressing under the contract the defendants built a plank walk across the top of the pipe in the pumping plant for the more convenient use of their workmen; and to protect them from the high-speed gearing the claimant was required to and did inclose said machinery with a casing at an extra cost to it of $479.05, which is reasonable if the claimant is entitled to recover therefor. The expense was necessitated by the plank walk so built across the top of the pipe as aforesaid by the defendants."

The argument of the learned counsel for the appellant regarding this item appears to be that the Government may make a contract omitting all reference to gear casing in its specifications, then change the method of operating its machinery, build a plank walk in close proximity thereto for the use of its workmen, and afterwards require the contractor to supply a casing or covering deemed necessary for the protection and safety of the men under a general provision of the contract making it the duty of the contractor to supply "any details omitted from either plans or specifications * * * without additional expense to the Government" (Brief, p. 17). To state the proposition, we submit, is to deny it.

Undoubtedly, the Government was bound to adopt every precaution and to instal every device which would render its machinery safe for its operatives, but such devices must be called for when wanted and paid for when furnished. The Government cannot in drafting specifications omit such important items as gear casing and subsequently, especially after making changes increasing the danger of the work and the necessity for protection, throw the burden of its omission upon the contractor who, as the court below found, was installing what the custom of the trade called for.

The construction of the contract should be taken most strongly against the Government whose officers prepared it.

Gibbons *vs.* United States, 109 U. S., 200.

When nothing to the contrary appears, the well-known usage of trade prevails in the construction of a contract.

Clark *vs.* United States, 6 Wall., 543.

Robinson *vs.* United States, 13 Wall., 363.

Where, in a contract for the construction of waterworks, the size or cost of valve boxes was not mentioned, this court held the usual size and cost was to be understood, and the extra cost of those of unusual size required by the defendant might be recovered.

Wood *vs.* Fort Wayne, 119 U. S., 312.

A specific provision in a contract calling for one injector and one pump controls a general provision of a contract that every thing needed for a lighthouse shall be supplied to make it ready for use.

Erickson *vs.* United States, 107 Fed. Rep., 204.

Alterations increasing or varying the quantities of work from that contemplated by the parties when they made their agreement, constitute a new and different work not covered by the agreement for which the contractor may recover its reasonable value.

Salt Lake City *vs.* Smith, 104 Fed. Rep., 457, 466.

Henderson Bridge Co. *vs.* McGrath, 134 U. S., 260.

Fourth Assignment of Error.

Breakage of Pumps.

This assignment of error relates to the XI finding of fact, holding the Government responsible for the cost of repairing the breakage of certain pipes caused by a sudden

increase in the pressure in the fresh and salt water systems in the Navy Yard connected with the pumping plant. The court found that the first break was caused "as the result of sudden pressure *caused by the Government* in one or the other of said water systems without notice to the claimant and without its fault." The claimant installed a reducing valve to prevent like accidents in the future but "notwithstanding this precaution the elbow of drain pipe No. 2 was subsequently broken by pressure in one or the other of said water systems, etc." (Finding XI, p. 40).

The Government was therefore plainly responsible for the natural consequences flowing from its own act which caused the first break, and if the second break was occasioned by sudden pressure due to the cessation of the use of fresh water in the Brooklyn city system, as counsel argues (Brief, p. 20), evidence to that effect should have been produced. The claimant made out a *prima facie* right to recover by showing that the second break occurred without its fault, notwithstanding its effort to prevent it, and if such break resulted from inevitable accident or other circumstances over which the Government had no control and for which it would not be responsible, we respectfully submit that the burden was upon the appellant to prove it.

The amount awarded the claimant under this finding for breaks was $699.97, of which $282.25 was for the breakage of drain pipe No 2 (R., p. 5).

In conclusion, we respectfully submit that the judgment of the court below should be affirmed.

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JOHN S. FLANNERY,
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Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

UNITED STATES, APPELLANT,
v.
THE UNITED ENGINEERING & CONTRACTING CO. } No. 381.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

Counsel for appellee in their brief (p. 3) take exception to the manner in which we have stated our understanding of what the Court of Claims held in this case. In support of our original statement (top p. 7) we call attention to certain portions of the findings and opinion of the court below. For convenience, we will quote them in full:

> "The claimant proceeded under the contracts with reasonable dispatch and without delay on its part until May first, 1903, when the work was ready for the installation of the machinery. Up to this date the claimant was delayed by the Government in making changes and alterations in the work and in the use of

the docks for docking vessels while the work was going forward. * * *" (Finding VII, p. 36.)

"During the period from May first, 1903, to April 21, 1904, the work was delayed by the claimant's subcontractors in not getting the pump castings in place, for which the Government was in no way responsible. The claimant was also delayed for a few days during said period by the Government while using the docks for docking vessels. * * * The court finds that notwithstanding the delays of the Government the claimant with reasonable diligence could have completed the plant for tests during said period by about September 21, 1903. The time consumed by the claimant from that time to April 21, 1904, a period of 210 days, or seven calendar months, was unreasonable by reason of which delays the Government was damaged, if measured by the liquidated damage clause of paragraph 12 of the specifications, at $25 per day, in the sum of $5,250; * * *." (Finding VIII, p. 37.)

The court say:

"Now, did the Government, by its conceded delays in preventing the completion of the work within the contract time, *thereby* waive the time limit so as to disable itself from thereafter claiming the benefit of the liquidated damage clause of the contract for failure to perform within a reasonable time? * * *." (Italics ours.) (P. 44.)

The opinion then proceeds to analyze a number of cases and to apply the law as follows:

> "Here the delays of the Government prevented the claimant from a strict performance and therefore it waived the contract time within which to perform *and that waiver operated to eliminate the definite date from which to assess liquidated damages;* and though the claimant in continuing the work was thereby obligated to complete the same within a reasonable time, the liquidated damage clause was not thereby *restored* and made *applicable* to an unreasonable time." (Italics ours.) (Middle p. 51.)

We maintain that the foregoing quotations of the court amply sustain our statement in the first and third paragraphs on page 7 of the original brief for appellant. There is nothing in the opinion elsewhere to the contrary. The *sole* ground of the decision is that the Government having prevented the contractor from completing the work within the stipulated time "thereby" in legal effect, abrogated or rescinded the liquidated damage clause of the contract. Whether it did have this effect or not is the precise question presented to this court for decision. The issue is not affected by the fact that in neither of the supplemental agreements 876–B or 876–C there was any provision made for extending the time of completion; neither is it affected by the fact that "no forfeitures or delays were charged to the claimant" prior to the time originally fixed for the completion of the work; neither is it affected by the fact

that in submitting proposed supplemental agreement 876–D the Government sought to protect itself by the inclusion of a provision therein preserving whatever rights it might have in respect to the matter of delay and the completion of the work.

The facts show conclusively that the Government did waive the time limit. It conceded that the contractor was not obliged to complete the work within the specified time, because such completion had been prevented by the Government's own acts. The simple and plain question is: Does that fact of *itself* nullify, abrogate, or rescind the liquidated damage clause of the contract?

Counsel for appellee endeavor to convey the impression that the United States in presenting supplemental agreement 876–D were seeking to "*revive*" a right which they realized had been waived, together with the right to claim damages for delays. (Appellee's brief, p. 7.) The proposed supplemental agreement 876–D was not incorporated in the record. The findings, however, refer to it in the following language:

> "After the plant was completed a board was appointed to pass upon the same and it recommended the acceptance of the plant and certain deductions from the contract price for failure to strictly comply with the specifications, amounting in all to $850. On March 24, 1905, the civil engineer in charge transmitted to the claimant a supplemental agreement (876–D) covering such deductions, which agree-

> ment contained a reservation 'that nothing herein contained and no action taken hereunder shall in any manner or degree affect the rights of either party hereto in the matter of delay and the completion of the work or otherwise, except as specifically stated,' which supplemental agreement the claimant refused to execute. * * *" (Finding VIII, p. 37.)

This finding does not support the suggestion that the Government was attempting to "revive" its right to deduct liquidated damages. There is no intimation therein that the Government conceded that it had lost its right by having waived the time limit or in any other manner. It was seeking to enter into an agreement with the contractor which would liquidate certain damages claimed by it on account of *defects* in the plant. All that the Government sought to do was to make it clear that it was not waiving its right to make further deductions under the liquidated damage clause of the contract.

The Government unquestionably realized that it had waived the time limit. It has been conceded from the beginning that the delays by changes made and changes contemplated and by docking vessels during the time of construction prevented the contractor from completing within the specified time. It does not follow from this, however, that it understood or conceded that it had "thereby" waived the right to deduct liquidated damages for the period of unreasonable delay.

Counsel for appellee have cited (p. 6) the case of *Cramp & Son* v. *United States* (216 U. S., 494–503)

in support of their contention that the liquidated damage clause of the contract here was waived. The case is not in point. As will be seen upon examination, it was the *time* of performance, or completion of the vessel which was waived, because both parties recognized it to be impracticable to complete it within the specified time. There was no question of liquidated damages in the case.

This case is also cited (p. 10) as authority for the statement that executive officers of the Government have no authority or power to deduct or settle unliquidated and unproven damages; but it should be borne in mind that the damages deducted here, and which the court below has held should be returned, were not *un*liquidated. As was stated in our original brief, it seems to have been conceded by all that paragraph 12 of the contract (quoted in full on p. 43) constitutes a clear and unequivocal provision for liquidated damages.

On page 11 of appellee's brief reference is made to appellant's brief, pages 13 and 14. Counsel seems to have gotten the impression that appellant conceded that no actual damages resulted from being deprived of the use of the pumping plant. Perhaps the language of the brief justifies that assumption. If the article "the" had been inserted after the word "proven" in the last line on page 13 of our original brief, as it should have been, there would have been no room for doubt about our meaning.

The use of this pumping plant very materially affected the use of both dry docks 2 and 3. By failure to have it ready for use it may have been necessary to dispatch vessels to other navy yards to be docked, which could have been more expeditiously and economically docked at the New York Navy Yard. It would be very difficult to determine just what damage the Government would suffer as the result of such an incident. It is perfectly apparent, though, that the element of damage would be present. It was to cover just such contingencies that paragraph 12 was inserted in the specifications. When it was subsequently incorporated in and made a part of the contract it is clear that such was the understanding of the parties.

Counsel for appellee concede that "*mere delay* * * * simply results in an equitable extension of the time for completion and relieves the contractor of damages for the period of delay for which he was not responsible." Counsel further say that they have never contended that "mere delay had any other or different effect. * * *" (P. 14.) What but "mere delay" was the cause of the failure to complete this contract within the specified time? The inference seems to be drawn by counsel that the Government had "abandoned" the time limit and damage clause.

It is clear from the findings that there was no intentional abandonment of the time limit or damage clause. If abandonment can be said to have occurred, it must be by legal inference alone, and that

inference must be predicated entirely upon the fact that subsequent to the date fixed for completion supplemental agreements were entered into which did not definitely extend the time for completion or specifically mention the liquidated-damage clause. As we have already argued, however, in our original brief (pp. 15 and 16), the supplemental agreements in question clearly provided that nothing therein should affect any provision or requirement of the original contract "except as specifically provided."

That it was "mere delay" which prevented the completion of this contract within the specified time is made quite clear by the court in Finding VII (p. 36), wherein it says that:

> "Claimant was delayed by the Government in making changes and alterations in the work and in the use of the dock for docking vessels while the work was going forward."

Of course, it was the "desire"—perhaps the "sole" desire—as stated by counsel for the appellee, that the work should be pushed to completion "as rapidly as possible." The Government was not hoping or expecting to profit by the contractor's failure to complete within a reasonable time. It was willing, and always has been willing, to shoulder its share of the responsibility for the delay in the completion of the pumping plant; but it seems to us irreconcilable with law and justice to hold that because it committed some acts of "mere delay" which pre-

vented the contractor from completing within the specified time, it thereby absolved itself from the right to collect liquidated damages for each day of unreasonable delay on the part of the contractor in completing the work.

In discussing the third assignment of error, counsel for appellee, speaking with reference to devices which would render the machinery safe for the operatives, say, "but such devices must be called for when wanted and paid for when furnished" (p. 15).

It should be borne in mind that the Government was not buying a mere valve, or a mere device for inclosing the valve. It was buying a pumping plant complete and substantial in every respect.

In discussing the fourth assignment of error, counsel for appellee suggest that if the break in question was occasioned by sudden pressure due to cessation of the use of fresh water in the Brooklyn city system "evidence to that effect should have been produced." They contend that appellee made out a *prima facie* right to recover by showing merely that a break had occurred. We insist that that is not enough. The claimant should not only show that the break occurred, but should show the cause thereof. This it failed to do. The court was unable, apparently, to determine which of the two possible conditions actually caused the break. The Government attempted to have it find that it was caused by pressure in the fresh-water system and cited testi-

mony to that effect. (Motion for new trial. Finding XI, p. 61.) If the court had found as a positive fact that the break was caused by pressure in the salt-water system, there would be room for argument that it was the fault of the United States. But it is insisted that in view of the finding made the judgment on this item should be reversed.

HUSTON THOMPSON,
Assistant Attorney General.

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THE UNITED ENGINEERING & CONTRACTING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE APPELLEE.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 381.

UNITED STATES, APPELLANT,

vs.

THE UNITED ENGINEERING & CONTRACTING COMPANY.

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The Assistant Attorney General, in his reply brief for the United States (p. 3), after quoting two extracts from the opinion of the court below, says:

> "We maintain that the foregoing quotations of the court amply sustain our statement in the first and third paragraphs on page 7 of the original brief for appellant. *There is nothing in the opinion elsewhere to the contrary.* (Italics ours.) The *sole* ground of the decision is that the Government having prevented the contractor from completing the work within the stipulated time 'thereby' in legal effect, abrogated or rescinded the liquidated damage clause of the contract."

The learned counsel for the appellant appears to have wholly overlooked the following paragraph in the opinion of the court below, where the Chief Justice clearly points out that the decision is based not only upon the action of the Government which prevented the contractor from completing the work within the stipulated time, but also on the failure of the Government to comply with the express terms of the contract requiring a written extension of the date of completion to enable it to assess *liquidated* damages:

> "Here, however, while specification 11, made part of the contract, provides that an extension of time for the completion of the work can only be granted in writing by the chief of the Bureau of Yards and Docks, no such extension was granted except by the terms of the first supplemental contract; nor, as therein provided, shall an extension of the time 'be implied from any cause under any circumstances.' Hence as the work was not completed within the contract time by reason of the delays of the Government, the time limit was thereby waived and the claimant had a reasonable time within which to perform. Moore, Receiver, *vs.* United States, 46 C. Cls., 139. See also Dodd *vs.* Churton, *supra*. This being true, the definite date from which the liquidated damages were to accrue was eliminated. Drown *vs.* Ingalls, 3 Wash., 424" (R., pp. 46, 47).

Again, the learned counsel for the United States says at page 4 of his reply brief:

> "*The facts show conclusively that the Government did waive the time limit.* (Italics ours.) It conceded that the contractor was not obliged to complete the work within the specified time, because such completion had been prevented by the Government's own acts. The simple and plain question is: Does that fact of itself nullify, abrogate, or rescind the liquidated damage clause of the contract?"

This court, in the leading case of *District of Columbia vs. Camden Iron Works* (181 U. S., 453), has answered this

question in the affirmative. In that case the District of Columbia had made a contract for the delivery of certain iron pipe by a fixed date, and the contract contained a provision that for a failure to complete the work at the time specified, there should be deducted from the money to become due under the contract "the sum of $10 *per diem* for the same period, estimated *as liquidated and fixed damages* to the District" (p. 455). Only a small proportion of the pipe was delivered prior to the contract date, but after that date pipe worth $11,404.09 at the contract rates was delivered to and accepted by the District of Columbia. The District of Columbia retained and attempted to set-off against this amount the fines and penalties charged by it against the contractor for non-delivery of the pipe within the time specified in the contract. The contractor sued and recovered judgment for the amount retained and this court affirmed the judgment, holding:

> "If strict performance by plaintiff was prevented or waived by defendant as contended on the facts, then the claim for fines or penalties for delay or failure to deliver the pipe could not be sustained" (Opinion, p. 464).

On page 5 of his reply brief, the learned counsel for the United States says: "*The Government unquestionably realized that it had waived the time limit,*" but at page 7 of said brief, after this frank admission, he makes the remarkable statement: "It is clear from the findings that there was no intentional abandonment of the time limit or damage clause."

The waiver of the time limit for completion necessarily carried with it the abandonment of the damage clause, because the contract provided:

> "12. Damages for delay.—In case the work is not completed within the time specified in the contract, or the time allowed by the chief of the Bureau of Yards and Docks under paragraph 11 of this specifi-

> cation, it is distinctly understood and agreed that deductions at the rate of $25 per day shall be made from the contract price for each and every calendar day after and exclusive of the date within which completion was required up to and including the date of completion and acceptance of the work," etc. (R., pp. 11, 12; Brief for Appellee, p. 4).

Manifestly, if the time limit was waived, as the court below found and as counsel for the appellant concedes, and the United States made no effort to extend it as required by paragraph 11 of the contract, there was no "date within which completion was required" from which *liquidated* damages could be calculated.

The right to *unliquidated* damages depends upon proof of such damages after delays have occurred, but the right to *liquidated* damages rests upon the agreement of the parties, and when the agreement has been violated or waived, it cannot be revived except by another agreement upon a consideration. The United States cannot drop time of completion entirely out of consideration while the work is in progress and then attempt to restore it long after the work has been accepted for the purpose of assessing a penalty as liquidated damages. The appellant, we submit, cannot consistently contend that although time of completion was waived its right to deduct liquidated damages was not. These two matters are so interwoven in the contract that the United States cannot sustain the one without showing the enforceability of the other. The effect of the argument of the learned counsel for the United States is to erect a castle in the air—a structure without a foundation.

Respectfully submitted,

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